Docket No. 81-2332

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

Office - Supreme Court, U.S.
FILED
JUN 28 1982
ALEXANDER L. STEVAS,
CLERK

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of The Commonwealth of Virginia,

Petitioner,

vs.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

on behalf of

The Community Redevelopment Agencies of the City of Los Angeles, The City of Long Beach, The City of Oceanside, The City of Anaheim, The City of Victorville, The City of Culver City, The City of Santa Ana, The City of Garden Grove, and The City of San Jose, California

WEISER, KANE, BALLMER AND BERKMAN
JAMES DEXTER CLARK, member,
United States Supreme Court Bar
GLENN WASSERMAN
KATHRYN REIMANN
354 S. Spring Street, Suite 420
Los Angeles, California 90013
(213) 617-0480

MC DONOUGH HOLLAND & ALLAN, P.C.
JOSEPH E. COOMES, JR.
RICHARD E. BRANDT
555 Capitol Mall, Ste. 950
Sacramento, California 95814

Counsel for the above-named agencies.

SUBJECT INDEX

	PAGE
INTEREST OF THE AMICI CURIAE	1
STATEMENT OF THE CASE	4
ARGUMENT	6
I. CONFLICT BETWEEN CASES	7
II. PUBLIC IMPORTANCE	14
CONCLUSION	17

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Appalachian Power Co. v. City of Huntington, 210 N.E. 2d 471 (W.Va.1974)	9
Artesian Water Co. v. State Dept. of Hwys. & Transp., 330 A.2d 432 (Del. Super.1974)	9
Bristol Tenn. Housing Auth. v. Bristol Gas Co., 407 S.W.2d 681 (Tenn. 1966)	9
Consumer Power Co. v. Costle, 615 F.2d 1147 (USCA 6th, 1980)	9
Cort v. Ash, 422 U.S. 66 (1975)	10
Dept. of Transp. & Development of Louisiana v. Beaird-Poulan, Inc., cert.denied, 449 U.S. 971 (1980)	12,13
Middlesex Co. Sewage Auth. v. National Sea Clammers Ass'n., 451 U.S. _____, 101 S.Ct. 26, 15, 69 L.Ed.2d 435 (1981)	11
Mountain States Tel. & Tel. Co. v. Boise Redevelopment Agency (9 Ida. Dist. Ct. 10/17/80)	9
New Orleans Gaslight Co. v. Drainage Comm. of New Orleans, 197 U.S. 453 (1905)	7

PAGE

Pacific Tel. & Tel. Co. v. City and County of San Francisco, 197 Cal.App. 2d 133, 17 Cal.Rptr. 687 (1961) 5

Pacific Tel. & Tel. Co. v. Redevelopment Agency of Glendale, 87 Cal.App.3d 296, 151 Cal.Rptr. 68 (1978) 8

Pacific Tel. & Tel. Co. v. Redevelopment Agency of the City of Redlands, 75 Cal.App. 3d 957, 142 Cal.Rptr. 584 (1977) 8

So. Union Gas Co. v. City of Artesia, 472 P.2d 368 (N.M., 1970) 9

State of California v. Sierra Club, 451 U.S. 287 (1981) 11

Texas Industries, Inc. v. Radcliffe Materials, Inc., 451 U.S. 630 (1981) 11

Touche Ross & Co. v. Reddington, 442 U.S. 560 (1979) 10

Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 11

PAGE

Statutes

California Constitution, Art. XIIIA 15

California Health and Safety Code §§ 33000 et seq. 1

California Health and Safety Code, §§ 33670 et seq. 15

California Pub. Utilities Code, § 7901 5

Uniform Relocation Act, 42 U.S.C. 4601 et seq. 2

Uniform Relocation Act, 42 U.S.C. 4627 11

Uniform Relocation Act, 42 U.S.C. 4630 12

28 U.S.C. 1331 6

Miscellaneous

Note, Implied Rights of Action in Federal Legislation: Harmonization Within the Statutory Scheme, 1980 Duke L.J. 928 10

INTEREST OF THE AMICI CURIAE

The California Redevelopment Agencies, political subdivisions of the State of California, respectfully submit this brief pursuant to Rule 42 of the Rules of this Court.

The represented redevelopment agencies are separate governmental entities existing pursuant to California Health & Safety Code §§ 33000, et seq. having their own law officers and exercising sovereign powers of the State. The amici curiae are, therefore, political subdivisions of the State of California. In each case, counsel for said entities acts either as general or special counsel for redevelopment matters.

These entities and their legal officers are concerned about and deeply affected by, the decision of the Fourth Circuit Court of Appeals.

That court's failure to consider the nature of the federal Uniform Relocation Act (42 U.S.C. § 4601 et. seq., hereinafter "URA"), and its blanket determination that relocation assistance must be paid to public utilities, not only conflicts with several state and federal court decisions to the contrary, but also has the effect of interpreting the laws of the various states (which are patterned after the URA) so as to require such assistance even when no federal assistance is involved. This is estimated to result in an increase in costs of desperately needed redevelopment projects in an amount exceeding 20%.

At the same time, the public utilities (at least in California) pay nothing for the right to place their lines in public rights of way, and are protected from competition by the States. To alter the long-standing rule that public utilities are not entitled to relocation

benefits unless statute requires otherwise would cause redevelopment agencies and other State and local governments to give away not only the public right of way but also the cost of relocating the utility lines any time a project requires the utility to move them.

This dramatic shift of the economic burden from the utility rate-payer (who ought to pay for the cost of bringing the service to him, but who was not obliged to pay for the right-of-way) will impose that burden, not on the general taxpayer, but upon the poor and other people served by redevelopment agencies in California. In this State, governmental agencies which rely on the property tax, (including redevelopment agencies), cannot increase that tax so as to force the general taxpayer to bear the utilities' burden. Thus, in order to pay the utilities, governmental services must be reduced, and

low income housing, blighted residence rehabilitation and other projects will inevitably suffer.

The represented agencies submit this brief in their own interests and in the interests of the people they serve.

STATEMENT OF THE CASE

The facts may be briefly summarized. The Norfolk Redevelopment and Housing Authority (NRHA), a political subdivision of the State of Virginia, acquired certain property in order to redevelop it. In doing so, it was assisted with federal funds. Upon acquiring property adjacent to various streets, NRHA requested that the City of Norfolk, a separate governmental entity and not a party hereto, vacate some of those streets so that redevelopment could proceed. The City complied.

Pursuant to a franchise agreement entered into between the predecessor of

the Respondent (C & P) and the City, C & P had obtained the use of the streets free of charge, but with the further agreement that C & P would, when required for public purposes, remove its facilities without charge. (In California, the right is given by statute and the agreement to remove is implied. See California Public Utilities Code § 7901 and Pacific Tel. & Tel. Co. v. City and County of San Francisco 197 Cal.App.2d 133, 17 Cal.Rptr. 687 (1961).

C & P complied with the request of the City, but then filed a claim with the State Agency. The State Agency denied the claim, and HUD concurred.

C & P now seeks to avoid its prior agreement by asserting that the federal URA gives it a new and federal cause of action for the payment of its relocation costs. It apparently urges that, because the State of Virginia adopted enabling statutes to apply the URA to localities,

and because federal assistance is involved, the utility's prior commitment may be ignored.

NHRA has the sole responsibility of paying whatever relocation benefits are required by law.

Neither the District Court nor the Court of Appeal directly considered the question of jurisdiction, but it is assumed that C & P brings this action pursuant to 28 USC § 1331.

ARGUMENT

It is the position of these Amici Curiae that the Petition for Certiorari in this case should be granted because of (1) the conflict in the cases, both Federal and State and (2) the public importance of this decision. These Amici Curiae believe that:

A. The 4th Circuit Court of Appeal incorrectly interpreted the Uniform Relocation Act (URA);

B. There is no evidence that Congress intended to confer a Federal cause of action to review the determination of a State Agency when there is State Court jurisdiction.

C. The opinion of the 4th Circuit, if permitted to stand, will provide a windfall to utilities at the expense of the underpriviledged and will effectively disrupt the regulation of public utilities by the States.

I.

CONFLICT BETWEEN CASES

Apparently because the utilities stand to gain so much from relocation support, this issue has been the constant subject of litigation for nearly a century. (See New Orleans Gaslight Co. v. Drainage Comm. of New Orleans 197 U.S. 453 (1905) for an early version of this controversy).

Virtually without exception, it has been held that under the common law, the public utility must pay for relocation of its facilities under circumstances such as this unless specific statutory authority is found to the contrary. The cases supporting this view have never taken the position that the broad term "all businesses" automatically means that there is an exception from the common law rule (see e.g. Pacific Tel. & Tel. v. Redevelopment Agency of Glendale 87 Cal.App.3d 296, 151 Cal.Rptr. 68 (1978) and Pacific Tel. & Tel. v. Redevelopment Agency of the City of Redlands 75 Cal.App.3d 957, 142 Cal.Rptr. 584 (1977), hrg. den.).

The Courts' unwillingess to imply such an exception is supported by the long-standing rule that in order to alter common law, explicit and specific statutory language must be used.

Other cases rejecting the public utilities' contentions include Consumer Power Co. v. Costle 615 F.2d 1147 (USCA 6th, 1980) and Mountain States Tel. & Tel. Co. v. Boise Redevelopment Agency (9 Ida. Dist. Ct. 10/27/80). See also: Appalachian Power Co. v. City of Huntington 210 S.E.2d 471 (W.Va., 1974); So. Union Gas Co. v. City of Artesia 472 P.2d 368 (N.M., 1970); Bristol Tennessee Housing Auth. v. Bristol Gas Co. 407 S.W.2d 681 (Tenn., 1966); Artesian Water Co. v. State Dept. of Hwys. & Transp. 330 A.2d 432 (Del. Super., 1974).

In stark contrast to these cases is the 4th Circuit opinion in this case. The opinion implies that no inquiry into legislative history or other statutes should be made, thus effectively casting doubt on all of the States cases engaging in such inquiry in order to interpret their statues which are similar to the Federal

URA. The effect of the 4th Circuit opinion will be to effectively undermine years of settled law in the States.

The 4th Circuit opinion creates another sort of conflict as well. This Court has had occasion recently to consider several circumstances in which the jurisdiction of the Federal courts was at issue.

Recent decisions of this Court manifest an undeniable trend to restrict the availability of implied causes of action under federal statutes. (See Note, Implied Rights of Action in Federal Legislation: Harmonization Within the Statutory Scheme, 1980 Duke L.J. 928). In Touche Ross & Co. v. Reddington, 442 U.S. 560, (1979), this Court modified the application of the four-factor test announced in Cort v. Ash, 422 U.S. 66 (1975), by announcing that the task of a federal court in implied cause of action

cases was solely to determine whether Congress intended to create the private right being asserted.

The Court has since reiterated this emphasis on Legislative intent. See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Association 451 U.S. _____, 101 S. Ct. 2615, 69 L.Ed. 2d 435 (1981); Texas Industries, Inc. v. Radcliffe Materials, Inc., 451 U.S. 630 (1981); State of California v. Sierra Club, 451 U.S. 287 (1981); Transamerica Mortg. Advisors, Inc. v. Lewis 444 U.S. 11, (1979).

Here, we are concerned with the applicability of federal legislation to a relocation assistance decision of a State Agency under State law as part of a federally assisted project. The only substantive provisions of the URA which deal with such State determinations are carefully treated in 42 U.S.C. §§ 4627 and

4630, which forbid the head of a federal agency from approving grants or other assistance to a State agency ". . .unless he receives satisfactory assurances from such State agency. . ." that fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a federal agency under other sections of the Act. (See, Department of Transportation and Development of Lousiana v. Beaird-Poulan, Inc., cert. denied, (per Justice Rehnquist dissenting), 449 U.S. 971 (1980).

Thus, Congress chose to encourage the States to make appropriate relocation assistance payments under their own laws by conditioning the availability of federal funds upon the provision of such payments.

> "The carrot of federal funds, not the stick of private suits, was

chosen by Congress as the means of providing relocation payments to those displaced by the States for federally assisted projects." Ibid.

Under such a statutory scheme, where Congress neither explicitly nor implicitly gave to the federal courts the power to review such State determinations, the implication of such power is unwarranted and unnecessary. HUD itself has indicated that its interpretation involves a State determination of the eligibility of public utilities for relocation assistance.

That is, the Congressional concern manifested by the applicable provisions of the Act was not that private parties allegedly aggrieved as a result of a State determination be permitted to take that grievance to federal court for resolution, but rather that the States assure the appropriate federal agency that relocation

procedures will be followed. Once the federal government has accepted those assurances, what remains is the implementation of State law by a State agency. The proper forum for resolving disputes arising thereunder is the appropriate State court. Congress did not create, nor did it intend to create, any remedy other than that available in the State courts. The Court of Appeals, by entertaining jurisdiction and construing the federal statute as creating such a private remedy, has decided in conflict with this intent, and the decisions of this Court restricting the availability of implied federal causes of action.

II.

PUBLIC IMPORTANCE

The vital importance of this case to communities throughout the country cannot be overestimated and is reflected in the

other amicus curiae briefs on this subject.

In California, the potential is even more serious than in other States. Virtually the only State-authorized source of redevelopment funds is the property tax (see California Health & Safety Code §§ 33670 et seq.). Because the California Constitution places a limit on the amount of property tax (Cal.Const. Art. XIII A; "Prop. 13"), the burden which the utilities seek to impose upon redevelopment agencies cannot be passed on to the general taxpayer. Redevelopment agencies will be obliged to cut their services.

Because the cost of relocating utilities will result in an estimated 20-30% of the total cost of a project, the redevelopment agencies' housing, rehabilitation and other programs will be cut by that amount. The effect is to place

the burden on the poor. It is they who will not receive housing or rehabilitation loans and it is they who will not receive the benefit of a redevelopment agency's other programs. At the same time, the utility rate payers will be relieved of part of the cost bringing the service to them.

Under the present system, the State protects the utility from competition, sets its rates and allows it to use public rights of way without charge. But the 4th Circuit opinion effectively replaces a portion of such regulation with some automatic interpretation of the URA. There is no discretion permitted by the 4th Circuit opinion, only payment. As shown in the other briefs submitted in support of the Petition, this result was not intended by Congress and obviously disrupts coordinated State regulation of public utilities.

CONCLUSION

The 4th Circuit opinion will cause disruption of the States' regulation of their public utilities. It will place the burden of utilities' relocation on California's poor. The opinion will open the doors of the Federal courts to reviews of State agencies and will involve Federal courts in questions which Congress never intended to be subject to their jurisdiction. The opinion is an incorrect interpretation of the URA and dramatically affects State powers and the Federal Courts.

For all of these reasons, this amicus curiae respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

WEISER, KANE, BALLMER
& BERKMAN
JAMES DEXTER CLARK
GLENN F. WASSERMAN
KATHRYN REIMANN
and
MC DONOUGH, HOLLAND
& ALLAN, P.C.
JOSEPH E. COOMES, JR.
RICHARD E. BRANDT.

Counsel for the Amici
Curiae